Supreme Court, U.S.
FILED
JAN 5 1981
MICHAEL RODAK, JR., CLERK

80-1118

NO.
IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES D. STANCIL and
G & E BUSINESS SERVICES, INC.
Petitioners,

v.

STATE OF GEORGIA
Respondent.

PEITTION FOR A WRIT OF CERTIORARI
TO THE
GEORGIA COURT OF APPEALS

Of Counsel:
ANJA M. SMITH
1409 Peachtree St., N.E.
Atlanta, Georgia 30309

CHARLES W. BOYLE
ROBERT EUGENE SMITH
1409 Peachtree St., N.E.
Atlanta, Georgia 30309
Attorneys for Petitioner

QUESTIONS PRESENTED

1. Does the exclusion of expert testimony in an obscenity prosecution on the basis that the expert is an educator and not a scientist constitute a denial of Due Process Rights in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

2. Does a state staute which provides that material not otherwise obscene may be obscene if its distribution constitutes commercial exploitation of erotica solely for the sake of its prurient appeal impermissibly chill(s) the dissemination of materials protected under the First and Fourteenth Amendments to the United States Constitution?

3. Does the failure by the trial court to charge the relevant community standard of "tolerance" violate the Petitioner's Due Process Rights?

4. Does a state statute which defines scienter in a manner which authorized obscenity convictions on mere "constructive" knowledge impermissibly chill the dissemination of materials protected under the First and Fourteenth Amendments to the United States Constitution?

PARTIES TO THE CASE

1. G.E. Business Services, Inc.

INDEX

TABLE OF CONTENTS

Page

Opinion Below 2

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 3

Statement 3

Reasons for Granting Writ:—

I. The exclusion of expert testimony in an obscenity prosecution on the basis that the expert is an educator and not a scientist constitutes a denial of due process in violation of the Fifth and Fourteenth Amendments to the United States Constitution. 4

II. A state statute which provides that material not otherwise obscene may be obscene if its distribution constitutes commercial exploitation of erotica solely for the sake of its prurient appeal impermissibly chill(s) the dissemination of materials protected under the First and Fourteenth Amendments to the Constitution of the United States 9

III. Failure by the trial court to charge the relevant community standard of "tolerance" violated the Petitioner's due process rights. 16

IV. A standard of scienter which authorizes obscenity convictions on mere "constructive" knowledge impermissibly chills the dissemination of expression protected under the First and Fourteenth Amendments to the United States Constitution. 18

Conclusion 00

Appendix A A.1
Appendix B A.6
Appendix C A.7
Appendix D A.8

TABLE OF CITATIONS

Cases

Ballew v. Georgia,435 U.S. 223 (1978) 19,20
Ballew v. Georgia, 436 U.S. 962 (1978) 19,20
Boyce Motor Lines, Inc. v. United States,
342 U.S. 337, 340 (1952) 21
Childs v. Oregon, 431 F.2d. 272, 276 (9th Cir. 1970) 15
Commonwealth v. Thureson, 357 N.E.2d. 750
(Mass. 1976) 26
Cunningham v. Gans, 507 F.2d. 496 (2d. Cir. 1974) 7
Fortner v. State, 528 S.W.2d. 378 (Ark. 1975) 23
Ginzburg v. United States,
383 U.S. 463 (1966) 9,13,14,15,24
Hamling v. United States,
418 U.S. 87 (1974) 19,21,22
Hygrade Provisions Co. v. Sherman,
266 U.S. 497 (1925) 21
Jenkins v. United States, 307 F.2d. 637 (D.C. Cir. 1962)
(en banc) 8
Johnson v. State, 351 So.2d. 10 Fla. (1977) 29
Kahm v. United States, 300 F.2d. 78 (54th Cir. 1962)
Cert. denied 82 X. Ct. 949 (1962) 28
Kaplan v. California, 413 U.S. 115, 121 (1972) 4,6,9
Kingsley Books, Inc. v. Brown, 334 U.S. 436 (1957) 27
Miller v. California, 413 U.S. 15 (1973) 5,9,18
Miller v. United States, 431 F.2d. 655, 657
(9th Cir. 1970) 15
Mishkin v. New York, 383 U.S. 502 (1966) 22,25
New Riviera Arts Theatre, 219 Tenn. 652, 412 S.W.2d.
890, 894-95 (1967) 15
Paris Adult v. Slaton, 413 U.S. 49 (1973) 7
People v. Andrews, 100 Cal. Rptr. 276 (1972) 29
People v. Bloss 388 Mich. 792, 201 N.W.2d. 806 (1972) 15
People v. Mature Enterprises, Inc. 73 Misc.2d. 749,
343 NYS2d. 911, 916 (1973) 15

People v. Speer, 52 Ill. App. 3d. 203,
367 N.E.2d. 372 (1977) 29
People v. Williamson, 24 Cal. Rptr. 734 (1962),
Cert. denied 377 U.S. 944 (1963) 29
Pinkus v. United States, 436 U.S. 293 (1978) 17
Redrup v. New York 386 U.S. 767 (1967) 15
Roth v. United States, 354 U.S. 476,
484-85 (1957) 13,17,21
Sedelbauer v. State of Indiana, 402 N.E.2d. 1006,
405 N.E.2d. 566 (on rehearing) (1980) 9
Sewell v. Georgia, 435 U.S. 982 (1978) 19,20
Spillman v. United States, 413 F.2d. 527 (9th Cir. 1969)
Cert. denied 90 S.Ct. 265 (1970) 28
Smith v. California,
361 U.S. 147 (1959) 4,9,13,21,30
Smith v. United States, 431 U.S. 291 at 305 (1972) 18
State v. Blair, 32 Ohio St.2d. 237,
291 N.E.2d. 451 (1972) 29
State v. Flynn, 519 S.W.2d. 10 (Mo. 1975) 29
State v. Grant, 508 S.W.2d. 585
(Tex. Ct. Crim. App. 1974) 29
State v. Hull, 546 P.2d. 912 (Wash. 1976) 29
State v. Lebevitz 294 Minn. 424,
202 N.W.2d. 648 (1972) 15
State v. Mollins, 533 S.W.2d. 231
(Mo. Ct. App. 1975) 29
State v. Richardson, 506 S.W.2d. 488
(Mo. Ct. App. 1974) 29
State v. White, 538 P.2d. 1235 (Wash. Ct. App. 1975) 29
State v. Yabe, 114 Ariz. 89, 559 P.2d. 209
(Ariz. Ct. App. 1977) 29
Teal v. Georgia, 435 U.S. 989 (1978) 19,20
United States v. Brown, 328 F.Supp. 196 (D.C. Va. 1971),
Vacated and remanded 413 U.S. 912 28
United States v. Ewing 445 F.2d. 945 (10th Cir. 1971)
413 U.S. 913 (1971) 25

United States v. Goldstein, 431 F.Supp. 974
(D.C., D. Kan. 1976) 29
United States v. Harris, 347 U.S. 612,
624 N. 15 (1954) 21
United States v. Hochmon, 277 F.2d. 631 (7th Cir. 1960) ... 27
United States v. Petrillo, 332 U.S. 1, 7-8 (1947) 21
United States v. Ragen, 314 U.S. 513, 523-524 (1942) 21
United States v. Ratner, 502 F.2d. 1300, 1301
(5th Cir. 1974) 15
United States v. Stewart 337 F.Supp. 299
E.D. Pa. (1971) 15
United States v. Wurzbach, 280 U.S. 396 (1930) 21
Volkland v. State, 510 S.W.2d. 585
(Tex. Ct. Crim. App. 1974) 29
Wheeler v. State, 35 Md.App. 372,
370 A.2d. 602 (1977) 29
Womack v. United States, 294 F.2d. 204 (D.C. Cir. 1960)
Cert. denied 365 U.S. 859 (1961) 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO.

JAMES D. STANCIL and
G & E BUSINESS SERVICES, INC.
Petitioners,

v.

STATE OF GEORGIA
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
GEORGIA COURT OF APPEALS

The Petitioner respectfully prays that a writ of Certiorari issue to review the opinion and judgment of the Georgia Court of Appeals entered in the above case on September 5, 1980. The Supreme Court of Georgia denied certiorari on October 16, 1980 (Appendix B).

OPINION BELOW

The opinion of the Georgia Court of Appeals is not yet reported, but a copy thereof is set forth in Appendix A hereto.

JURISDICTION

The Judgment of the Georgia Court of Appeals was entered on September 5, 1980. Thereafter, the Supreme Court of Georgia denied a timely filed Petition for Writ of Certiorari on October 16, 1980. A copy of said denial is set forth herein in Appendix B. A timely Motion for Reconsideration to the Supreme Court of Georgia set forth herein as Appendix C was denied on November 5, 1980. The Court's jurisdiction is invoked under Title 28 United States Code § 1257 (3).

QUESTIONS PRESENTED

1. Does the exclusion of expert testimony in an obscenity prosecution on the basis that the expert is an educator and not a scientist constitute a denial of Due Process Rights in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

2. Does a state statute which provides that material not otherwise obscene may be obscene if its distribution constitutes commercial exploitation of erotica solely for the sake of its prurient appeal impermissibly chill(s) the dissemination of materials protected under the First and Fourteenth Amendments to the United States Constitution?

3. Does the failure by the trial Court to charge the relevant community standard of "tolerance" violate the Petitioner's Due Process Rights?

4. Does a state statute which defines *scienter* in a manner which authorized obscenity convictions on mere "constructive" knowledge impermissibly chill the dissemination of materials protected under the First and Fourteenth Amendments to the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First and Fourteenth Amendments to the United States Constitution are set forth in Appendix D hereto.

STATEMENT

Petitioners, James D. Stancil and G. & E Business Services, Inc., were convicted in the State Court of Fulton County for distributing obscene materials, the charges being predicated upon the sale of books at adult bookstores allegedly owned and operated by G & E Business Services, Inc. Petitioner Stancil was alleged to have been an employee of G & E Business Services at the time of his arrest.

Petitioners were then tried before a jury in the State Court of Fulton County. During the trial, the Court excluded the testimony of Dr. June Butts on the grounds that although she was an educator and qualified as an expert in the area of education, she was not an expert in the area of science and could not testify as to the serious scientific value of the material. At the conclusion of the trial, a jury found Petitioners guilty. They thereafter appealed their convictions to the Georgia Court of Appeals which affirmed the trial judgment in all respects in a judgment and opinion for which review is sought by this Petition.

REASONS FOR GRANTING THE WRIT

I

THE EXCLUSION OF EXPERT TESTIMONY IN AN OBSCENITY PROSECUTION ON THE BASIS THAT THE EXPERT IS AN EDUCATOR AND NOT A SCIENTIST CONSTITUTES A DENIAL OF DUE PROCESS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In the proceedings below, the expert testimony of Dr. June Butts was offered in the area of the scientific value of the materials in question and was denied by the Court on the grounds that the Court found her to be an educator, but not a scientist. The qualifications of Dr. Butts included the teaching of sex therapy in medical schools and universities. Petitioner contends that the affirmance by the Court of Appeals of the Court below excluding Dr. Butts' expert testimony violated Petitioner's rights to due process under the United States Constitution.

The Court entirely overlooked Petitioner's substantive due process rights which magnify rather than minimize the inherent importance of expert testimony. Implicit in those rights is the opportunity by a criminal defendant, especially in an obscenity prosecution "to enlighten the judgment of the tribunal" by such testimony so as to prevent the speculative proof an obscenity prosecution is likely to entail. *Smith v. California*, 361 U.S. 147, 164-65 (1959) cited with approval. *Kaplan v. California*, 413 U.S. 115, 121 (1972). By excluding the testimony by Dr. Butts, the expert offered by the defense, the trial Court substantially impaired the very essence of the defense. *Smith v. California, supra*. The affirmance of the Trial Court by the Court of Appeals and the denial of Certiorari by the

Georgia Supreme Court is in effect tantamount to suggesting that an expert, no matter how qualified in terms of skills, experience and education, should not be allow to testify in an obscenity case.

Under *Miller v. California, supra,* the last element of the tri-partite test of obscenity is "whether the work taken as a whole lacks serious artistic, political or scientific value". *Id.* at 24. The Expert Testimony Rule in Georgia apparently tracks the *Federal Rule of Evidence 702,* Agnors Georgia Evidence 9-5A (1978).

> "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness, qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."

Dr. Butts has had extensive training in the areas of sex therapy and demonstrated her professional achievements and expertise in this area. She has taught this subject in academic institutions, including medical schools. Her present position is at the Howard University Medical College where she teaches sex therapy in the Psychiatry and Pediatrics departments. This latter experience presumes a scientific orientation to her field of study and necessarily represents acceptance of the field of sex therapy by the scientific community. The Petitioner contends that the trial judge abused his discretion in denial of this expert testimony.

The Court below and the Court of Appeals apparently adopted a particularized element in her qualifications as a scientific expert. The Court failed to consider social science a "science" under the Miller definition. Yet education as a social science is intrinsic to science and part. The term "science" under *Miller* was not limited by the Supreme Court to natural or physical sciences, thus this Court

below's derogation of the "social" sciences was unwarranted and constituted error.

However, although Dr. Butts' testimony was erroneously excluded on the grounds that she was merely a social scientist, her testimony was not offered to show the educational value of the materials. The professional status of a sex therapy educator presumes detailed knowledge of the psychological and physiological impact that certain sexually explicit materials may have on the average person and it was this evidence that the defense sought to offer at trial. Then, clearly the Court below had no valid grounds to exclude the expert testimony.

Thus, it is certain that Dr. June Butts' knowledge, skill, experience, training and education in the area of sex therapy would have assisted the triers of fact to have determined the scientific value of the materials in issue. The inherent importance of such expert testimony cannot be minimized. The Supreme Court has stated that exclusion of such evidence of the defense constitutes violation of the defendant's due process rights.

> "The uncertainties pertaining to the scope of scienter requisite for an obscenity prosecution and *the speculative proof that the issue likely to entail, are considerations that reinforce the right of one charged with obscenity – a right implicit in the very nature of the legal concept of obscenity – to enlighten the judgment of the tribunal*, be it the grand jury or as in this case the judge, regarding the prevailing literary and moral community standards and to do so through qualified experts. It is immaterial whether the basis of the exclusion of such testimony is irrelevance for the incompetance of experts to testify to each matters." *Kaplan v. California*, 413 U.S. 115, 121 (1972). (Emphasis added).

In its opinion, the Court of Appeals cited *Paris Adult v. Slaton*, 413 U.S. 49 (1973), as standing for the proposition that "It is not error to fail to require expert affirmative evidence that the materials were obscene, when the materials themselves were actually placed in evidence; the films are the best evidence of what they represent." (Page 2 of the Opinion). Consequently that Court concluded that the exclusion of Dr. Butts was not error, thereby entirely overlooking that unlike *Paris Adult, supra*, a civil action instituted in a State Court by a local district attorney for declaration that certain motion pictures were obscene and for an injunction, the Appeal herein involved a *criminal* prosecution. Unlike *Paris Adult, supra*, the question here is not whether expert evidence is *required*. Rather the issue is whether in a criminal obscenity prosecution, the defense is *entitled* to the testimony of an expert witness adequately offered as such as a matter of constitutional law, where such testimony would be of assistance to the triers of facts.

The Court of Appeals concluded the issue presented as to the qualifications of Dr. Butts by relying on the "sound discretion of the trial judge" as justification for the exclusion of Dr. Butts' testimony elicited on cross examination by the prosecution on her definition as a social scientist and educator of the word "science." Without regard to Dr. Butts' other statements in the record regarding social science, attitudinal research, methodological data collection and control and experimental groups, that Court cited Dr. Butts' philosophical statements about the word "science" and "scientific method" in support of its conclusion that the trial Court might have had doubts about her qualifications, and, therefore, not have admitted her testimony.

It is well established that the trial Court should not rely on labels. The trial Court should have investigated the competence Dr. Butts would bring to bear on the issues, and whether her testimony would aid the trier of fact in reaching its decision. *Cunningham v. Gans*, 507 F.2d. 496 (2d. Cir. 1974). The necessity of evaluating the assistance

to jurors an expert provides is clearly expressed in the case of *Jenkins v. U.S.*, 307 F.2d. 637 (D.C. Cir. 1962) (en banc). In that case, the Court sets forth that the competence as an expert witness depends on the nature and extent of the expert's knowledge, and not upon the claim to a particular title. The principle to be derived from *Jenkins, supra,* is whether the "experience or training enables a proffered witness to form an opinion which would aid the jury" at p. 644-646.

As a social scientist and educator, Dr. Butts was particularly qualified to be admitted as an expert. She had extensive training in the area of sex therapy, her professional achievements in the area and her teaching of the subject in academic institutions, including medical school for many years which certainly qualified her and would have been helpful to the jury, and her philosophical explanation of "science" and "scientific method" as opposed to her explanation of those terms as a social scientist were not grounds for excluding her.

The Court of Appeals speculated as to the basis on which the trial Court excluded the testimony of Dr. Butts to support its rationale of an inadequate proffer. In doing so, that Court relied on a series of cases that do not apply here. Contrary to that Court's conclusion, the proposed witness, Dr. Butts, was adequately proffered. This Court has made it abundantly clear that the denial of expert witness testimony proffered on behalf of a defendant in so-called criminal obscenity prosecutions implicates substantive due process considerations, stating:

> "The two reasons coalesce, for community standards or the psychological or physiological consequences of questioned literature can as a matter of fact hardly be established except through experts. Therefore, to exclude such expert testimony is in effect *to exclude as irrelevant evidence that goes to the very essence of the defense and therefore to the constitutional safeguards* of due pro-

cess." *Smith v. California,* 361 U.S. 147, 164-65 (1959). Cited with approval. *Kaplan v. California,* 413 U.S. 115, 121 (1972), (Emphasis added.)

For the foregoing reasons, the exclusion of Dr. Butts' testimony was constitutionally affirmed and the Petitioner's conviction must be reversed.

II.

A STATE STATUTE WHICH PROVIDES THAT MATERIAL NOT OTHERWISE OBSCENE MAY BE OBSCENE IF ITS DISTRIBUTION CONSTITUTES COMMERCIAL EXPLOITATION OF EROTICA SOLELY FOR THE SAKE OF ITS PRURIENT APPEAL IMPERMISSIBLY CHILL(S) THE DISSEMINATION OF MATERIALS PROTECTED UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

This issue especially merits review because the decision of the Georgia Court of Appeals conflicts with other jurisdictions and because it allows the trier of fact to completely disregard the *Miller v. California,* 413 U.S. 15 (1973), test if the material is distributed for pecuniary gain. In *Sedelbauer v. State of Indiana,* 402 N.E.2d 1006, 405 N.E.2d 566 (on rehearing) (1980), the Court of Appeals of Indiana held that an instruction on pandering is a denial of due process in the absence of *Ginzburg v. United States* 383 U.S. 463 (1966), type evidence of pandering. The opinion of the Georgia Court of Appeals refuses to give a reason for their opinion. They merely quote the statute applicable.

The importance of this issue is clear because if the Georgia decision is allowed to stand, juries can completely disregard the teachings of this Honorable Court and find publications not obscene

to be obscene if they are sold for a profit in an environment where erotic material is offered for sale.

The substance of the testimony at the trial was that law enforcement officers purchased four magazines from Petitioner. During trial, no evidence of methods of production, editorial goals or motivation was offered by the prosecution. Furthermore, there was no showing that the magazines at issue appealed to the prurient interest. Nonetheless, the trial Court charged the jury according to *Georgia Code Ann. §26-2101(d),* which reads:

> "(d) Material, not otherwise obscene, may be obscene under this section if the distribution thereof, or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal."

The Court of Appeals affirmed Petitioner's convictions and upheld *Georgia Code Ann. §26-2101.* Contrary to the Court of Appeals' ruling, *Georgia Code Ann. §26-2101* is unconstitutional under the *First* and *Fourteenth Amendments* to the United States Constitution. The full text of *Georgia Code Ann. §26-2101* reads as follows:

> (a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word "knowing", as used herein, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter, and a person has constructive knowledge of the obscene contents if he has know-

ledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. Provided, however, the character and reputation of the individual charged with an offense under this law, and if a commercial dissemination of obscene material is involved, the character and reputation of the business establishment involved may be placed in evidence by the defendant on the question of intent to violate this law. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(b) Material is obscene if:

(1) to the average person, applying contemporary community standards, taken as a whole, it predominantly appeals to the prurient interest, that is a shameful or morbid interest in nudity, sex or excretion;

(2) the material taken as a whole, lacks serious literary, artistic, political or scientific value, and

(3) the material depicts or describes, in a patently offensive way, sexual conduct specifically defined in subparagraphs (i) through (v) below:

(i) acts of sexual intercourse, heterosexual or homosexual, normal or perverted, actual or simulated;

(ii) acts of masturbation;

(iii) acts involving excretory functions or lewd exhibition of the genitals;

(iv) acts of bestiality or the fondling of sex organs of animals;

(v) sexual acts of flagellation, torture or other violence indicating a sadomasochistic sexual relationship;

(c) Additionally, any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this section.

(d) Material, not otherwise obscene, may be obscene under this section if the distribution thereof, or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(e) It is an affirmative defense under this section that dissemination of the material was restricted to:

(1) a person associated with an institution of higher learning, either as a member of the faculty or a matriculated student, teaching or pursuing a course of study related to such material; or

(2) a person whose receipt of such material was authorized in writing by a licensed medical practitioner or psychiatrist.

A person convicted of distributing obscene material shall be punished as for a misdemeanor of a high and aggravated nature. *Acts 1975 p. 498.*

The constitutional deficiency is demonstrated by the fact that the language of *Georgia Code Ann. §26-2101(d)* would permit a conviction simply because the display in an adult bookstore consists of sexually explicit magazines. In deciding the question of obscenity *ven non,* the jury may very well have determined initially that the magazines at issue were not obscene according to *§26-2101(b)(1)(2)(3)* setting forth the triparte obscenity test. However, when faced with the additional instructions of *Georgia Code Ann. §26-2101(d)* may have found the magazines obscene erroneously associating the mere display of sexually explicit magazines in an adult bookstore with the "pandering" instructions given by the Court thereby finding Petitioner guilty. The instructions given by the trial Court of *§26-2101(d)* in conjunction with *§26-2101(b)(1)(2)(3)* totally annihilate the idea that sexually explicit material is presumptively protected under the *First Amendment,* unless proven to be obscene.

The practical and primary effect of *Georgia Code Ann. §26-2101(d)* is to substantially undermine the precious freedom of speech guaranteed by the *First Amendment* to the Constitution of the United States in that *Georgia Code Ann. §26-2101(d)* as written and applied results in prior restraint. This type of pre-censorship is clearly unconstitutional. *Georgia Code Ann. §26-2101(d)* effectively curtails the type of materials a bookseller displays and

> "tends to restrict the public's access to forms of the printed word which the state could not constitutionally suppress directly. The bookseller's self-censorship compelled by the state would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books both obscene and not obscene would be impeded,"

such as prohibited in *Smith v. California,* 361 U.S. 147, 153-54 (1959). It is further made abundantly clear in *Roth v. U.S.*, 354, U.S. 476 (1957) and its progeny, that all ideas, even with the slightest importance, be they unorthodox, controversial, or even hateful, have the full protection of the *First Amendment* guarantees, unless they encroach upon more important interest.

The mere existence of an adult bookstore displaying sexually explicit magazines does not justify "pandering" instructions. The magazines here at issue did not qualify for "pandering" instructions for the further reason that no evidence of methods of production, editorial goals or motivation was offered by the prosecution, nor was there any showing that magazines at issue here appealed to the prurient interest of a deviant group such as the evidence showed in *Ginzburg v. U.S.*, 383 U.S. 463 (1966). The pandering concept of *Ginzburg* is not triggered merely by an open sale of sexually explicit materials, but by the use of advertising "displaying the leer of the sensualist." *Id.*, at 468 which is thrust upon society. This lack

of evidence herein made it improper for the Court to charge on pandering.

The pandering instruction is perhaps the most potentially dangerous threat to First Amendment protections. As the instruction in effect permits the triers of fact to disregard the other constitutional standards of obscenity, this instruction must be exercised only with great caution. As no evidence of pandering was submitted in the proceedings below, and as the principal instructions contained, no definition as to the nature and limits of the term pandering, this instruction constituted gross prejudicial error. The origin of the pandering concept was the case *Ginzburg v. United States*, 383 U.S. 463 (1966). Ginzburg was convicted under 18 U.S.C. §1461 for mailing a hardbound magazine, *Eros*, another periodical, *Leason*, and a book, *The Housewife's Handbook of Selective Promiscuity*. On the appeal, Justice Brennan, writing for the Court, noted that as many of the articles in the periodicals seemed to be serious literary efforts, the materials standing alone presented a very close case. Therefore, he determined that it was necessary to look beyond the materials to the nature of their distribution which was described as "commercial exploitation of erotica solely for the sake of their prurient appeal", *id* at 465-66. Then even through the materials may not have been obscene, they became so by virtue of the nature of distribution. This finding of pandering was based upon two factors: (1) that *Ginzburg* had sought mailing privileges in Blue Ball and Intercourse, Pennsylvania and ultimately obtained such privileges in Middlesex, New Jersey presumably for the "appeal" of the postmark; secondly, that the singular theme of the advertising campaign was the erotic value of the publications. Thus, the *Ginzburg* Court held:

> Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in determination of obscenity, *id* at 471.

However, the pandering concept of *Ginzburg* is not triggered merely by an open sale of sexually explicit materials but by the use of advertising "displaying the leer of the sensualist", *id* at 468, which is thrust upon society. As Justice Brennan emphasized:

> "Such representation would tend to force public confrontation with the potentially offensive aspects of the work; the brazeness of such an appeal heightens the offensiveness of the publications to those who are offended by such material." *Id* at 470.

Thus, previews of a motion picture depicting only its prurient aspects may be relevant to pandering, *New Riviera Arts Theatre v. State*, 219 Tenn. 652, 412 S.W.2d. 890, 894-95 (1967). A huge indiscriminate mailing list would be indicative of pandering, *Miller v. United States*, 431 F.2d 655, (9th Cir. 1970). Sensationalist advertising, explicitly emphasizing eroticism or pruriency of certain subject matter is typically pandering evidence, *United States v. Ratner*, 502 F.2d 1300, 1301 (5th Cir. 1974); *Childs v. Oregon*, 431 F.2d 272, 276 (9th Cir. 1970). However, advertising in and of itself is not pandering, *People v. Bloss*, 388 Mich. 792, 201 N.W. 2d 806 (1972); *People v. Mature Enterprises, Inc.*, 73 Misc. 2d 749 343 NYS 2d 911, 916 (1973). And advertising which merely warns about the sexually explicit aspects of the material is not pandering, *United States v. Stewart*, 337 F.Supp. 299 E.D.Pa. 1971; *State v. Lebevitz*, 294 Minn. 424, 202 N.W. 2d 648 (1972). It is clear that mere open display and sale is not pandering, nor are enticing or lurid pictures and text on the cover, *Redrup v. New York*, 386 U.S. 767 (1967);

For the foregoing reasons, *Georgia Code Ann. §26-2101* invites a significant threat that inconsistent unwarranted prosecutions under such a standard inherently violative of the *First Amendment* and due process provisions will chill protected expression. Such a result may

not be countenanced under the *First Amendment*. This statute must be overturned as fatally defective and the conviction of the Petitioner should be reversed.

III.

FAILURE BY THE TRIAL COURT TO CHARGE THE RELEVANT COMMUNITY STANDARD OF "TOLERANCE" VIOLATED THE PETITIONER'S DUE PROCESS RIGHTS.

In its opinion, the Court of Appeals upheld as constitutionally sound the instructions to the jury on the relevant community standards. As these instructions were a clear misconstruction of the constitutional protections afforded under the *First Amendment*, significant prejudice to the Petitioner's due process rights was necessarily incurred.

Specifically, in the proceedings below, the Court expressly refused to charge on the community standard under a standard of tolerance. Instead, the Court indicated to the jury that the relevant community standard of obscenity was the level of acceptance that the community affords to a sexually explicit form of expression:

> "In assessing contemporary community standards, you are permitted to draw on your own knowledge of the community standards' means the average conception of the time and the present critical point in the compromise between candor and shame in which the community may have arrived here and now". (T 250).

This artfully vague and ambiguous definition of the standard necessarily implies that if the community, as a whole, in its enlightened "compromise" would accept and embrace the materials in contention, only then would such matter escape a conviction of

obscenity. Certainly constitutional protection is not limited to forms of expression which merit the approval and acceptance of the majority of community members. This conclusion would derogate the threshold of the *First Amendment* protection to a concept of majority rule.

It is implicit in the history of the *First Amendment* that tolerance is the precept of constitutional protections. As Justice Brennan aptly stated in *Roth v. United States:*

> "All ideas having even the slightest redeeming social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full protection of the (First Amendment) guarantees unless excludable because they encroach upon the limited area of more important interests."
> 354 U.S. 476, 484-85 (1957). (Emphasis added).

The charge to the jury that a finding of obscenity may be determined by the standards of acceptance and approval that prevail in the community as a whole, strikes at the heart of the *First Amendment* Constitutional protection of speech. The essence of American society is diversity and thus, expression of diverse values and interests is fundamentally protected and encouraged under the *First Amendment*. The injection of the standard of acceptance by the trial judge necessarily confounded the jury's perceptions as to the reach of the First Amendment protections as it applied to this Petitioner.

In its opinion, the Court of Appeals entirely overlooked that this Court has already ruled on the constitutional necessity of "tolerance" instructions. Any charge falling short of "tolerance" with respect to contemporary community standards would, therefore, constitute error. In *Pinkus v. United States*, 436 U.S. 293 (1978), this Court held that "those community standards must be applied in accordance with the "understanding of tolerance of the average person in the community", 436 U.S. at 298. The average person is neither the

most prudish, nor the most tolerant. In *Miller v. California*, 413 U.S. 15 (1973) again this Court speaks of the level of "tolerance" of the average person, 413 U.S. 15, 32. Also, in *Smith v. United States*, 431 U.S. 291 at 305 (1972), this Court sets forth that the contemporary community standard to be applied is in accordance with a juror's "own understanding of tolerance of the average person in their community." The Court of Appeals' conclusion that the instructions given, though "not reflect[ing] with precision the definition of a community standard" nevertheless substantially complied with *Smith v. United States*, is in derogation of rather than in compliance with the *Smith* decision. The Court of Appeals' conclusion and the Supreme Court of Georgia's denial of Certiorari substantially and prohibitively narrowed the minimum constitutional requirement of community standard instructions and clearly constituted harmful and reversible error. For this reason, Petitioner's conviction should be reversed.

IV.

A STANDARD OF SCIENTER WHICH AUTHORIZES OBSCENITY CONVICTIONS ON MERE "CONSTRUCTIVE" KNOWLEDGE IMPERMISSIBLY CHILLS THE DISSEMINATION OF EXPRESSION PROTECTED UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In its charge to the jury, the trial court gave the following instruction on the issue of *scienter:*

> ". . . the word 'knowing,' as I have used it, shall be deemed to be the actual knowledge or constructive knowledge of the obscene contents of the subject matter. A person has constructive knowledge of the obscene con-

> tents if he has the knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material."

This instruction is in accord with the terms of Georgia Criminal Code §26-2101(a) which Petitioner challenges. The seriousness of this question is well demonstrated by the fact that *certiorari* has been granted on this precise issue in *Ballew v. Georgia*, No. 76-761, question number 2, *certiorari* granted January 25, 1977. The *Ballew* case was decided on other grounds, however, and this Court therefore did not reach the issue of "constructive knowledge." See Ballew v. Georgia, 435 U.S. 223, (1978) *(Ballew I)*, decided March 21, 1978. In *Ballew v. Georgia*, 436 U.S. 962 (1978) *(Ballew II)*, the dissent by Justices Brennan, Stewart, and Marshall indicates that these Justices would have granted *certiorari* on the *scienter* issue in the following words:

> "I see no reason to suppose that this issue is any less worthy of consideration on certiorari now than it was when we accepted it in *Ballew I*. For this reason, I would grant certiorari."

Furthermore, the dissenting opinions by Justices Brennan, Marshall, and Stewart in *Sewell v. Georgia*, 435 U.S. 982 (1978) and in *Teal v. Georgia*, 435 U.S. 989 (1978), both decided April 24, 1978, indicate that from a constitutional standpoint, jury instructions permitting a basing of *scienter* on "constructive knowledge" are impermissible under the Constitution of the United States.

Petitioner contends that predicating a conviction upon a finding of "constructive knowledge" is constitutionally impermissible under *Hamling v. United States*, 418 U.S. 87 (1974), where this Court enunciated the constitutional minimum standard of *scienter* as follows:

> "We think the 'knowlingly' language of 18 U.S.C. §1461 and the instructions given by the district court in this case satisfy the constitutional requirements of *scienter*. It is constitutionally sufficient that the 'prosecution show that the defendant *had* knowledge of the contents of material he distributes, and that he knew the character and nature of the materials.' " 418 U.S. at 123 (Emphasis added.)

Consistent with the above statement from Hamling, Petitioner contends that the prosecution must show that he "had" knowledge rather than that he "should have had" knowledge of the content, character and nature of the materials with which he was charged. In addition, it is here submitted that the dissenting opinions by three United States Supreme Court Justices, namely justices Brennan, Marshall, and Stewart in *Teal*, and *Sewell, supra*, amply demonstrate the substantiality of the question. Indeed, Justice Brennan, with whom Justice Marshall joined, dissenting, states with regard to the constitutionality of Georgie Code §26-2101(c):

> "In *Ballew v. Georgia*, 435 U.S. [223] (1978), we granted certiorari to consider, but did not reach, the precise *scienter* issue now raised by appellant . . . I see no basis for concluding that a federal constitutional question sufficiently substantial to be granted review on certiorari is now so insubstantial to require exercise of our mandatory appellate jurisdiction in this case." *Sewell, supra*.

The United States Supreme Court's dismissal of the appeals in *Teal, Sewell, and Ballew II* thus clearly did not go to the merits of the *scienter* arguments, especially in light of the recognition by Justices Brennan, Marshall, and Stewart of the importance of the question raised and the desirability of having various aspects of those issues further illuminated.

Petitioner submits that the instruction on *scienter*, as given by the trial Court, fails to meet the constitutional minimum standards of *scienter* set forth by this Court in *Hamling, supra*. As the Court is aware, the principles governing the issue of *scienter* in the area of First Amendment litigation originates with the decision in *Roth v. United States*, 354 U.S. 476 (1957).

In deciding *Roth v. United States, supra*, the Court stated that the obscenity statutes there involved and as construed were not too ambiguous to define a criminal offense. Each of the cases cited to support this ruling, however, stressed the fact that the respective statute involved was directed only at those with guilty knowledge or intent. See, e.g., *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947); *United States v. Harris*, 347 U.S. 612, 624 n. 15 (1954); *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952); *United States v. Ragen*, 314 U.S. 513, 523-524 (1942); *United States v. Wurzbach*, 280 U.S. 396 (1930); *Hygrade Provisions Co. v. Sherman*, 266 U.S. 497 (1925).

The constitutional validity of the obscenity statutes involved in *Roth* rested therefore, in significant measure upon the understanding that the statutes were not intended to apply to those who distribute material dealing with sex, but only to those who had knowledge that the particular material distributed was of obscene character and content.

The issue finally was resolved by the decision in *Smith v. California*, 361 U.S. 147 (1959). It was there held that the strict liability feature of the California obscenity ordinance there involved was seriously restricting the circulation of books which were not obscene, "by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold." 361 U.S. at 152. The tendency of the California ordinance, this Court held, was to erode fundamental freedoms of speech and press by holding a

bookseller criminally liable for possessing an obscene book, "wholly apart from any *scienter* on his part regarding the book's obscenity." 361 U.S. at 160.

In *Mishkin v. New York,* 383 U.S. 502 (1966), the Court stated:

> "The Constitution requires proof of *scienter* to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity." 383 U.S., at 511.

In approving the authoritative interpretation placed upon the New York obscenity statute by the highest court of the state with respect to the "stringent *scienter* requirement" and "vital element of *scienter,*" 383 U.S., at 507, 510 n.5, the Court specifically noted that a parenthetical reference in the Court of Appeals' opinion to "knowledge of the contents of the books" was not to be read as a "modification of this definition of scienter." 383 U.S., at 510 n.9.

Hamling, supra, sets forth that the prosecution must show that a defendant "had" knowledge of the content, character, and nature of the materials with which he is charged and that the jury must be thusly instructed. To hold otherwise would permit conviction solely on the basis of guesses and assumptions of police officers that a particular sexual device is obscene. To this effect, it is stated in the dissent in *Sewell, supra:*

> ". . . the constructive *scienter* requirement of §26-2101 (a), at least as applied in appellant's trial, provides no reasonable assurance that persons will know or ought to know when they are likely to violate §26-2101 (c)." *Sewell,* at 5.

The Justices thus recognize the impermissible chilling effect

produced by the constructive knowledge instructions given in Petitioner's case. It is Petitioner's contention that when instructions of "constructive knowledge" are given, every purveyor of presumptively protected First Amendment material is at the mercy of an unpredictable jury determination that some facet of the title or cover of the material he distributes gave him reason to refrain from distributing such material until he could complete a review of it.

Thus, unless a statute is clear as to what conduct is prohibited, conviction can only be based on unconstitutional conjecture warranting reversal. Erroneous instructions by the Court were given in *Fortner v. State*, 528 S.W. 2d. 378 (Ark. 1975). Here the defendants were convicted of selling an obscene motion picture film and they appealed. The Supreme Court of Arkansas held that evidence as to one of the defendants was insufficient to support the conclusion that she had knowledge that the film sold was obscene. The *scienter* requirement was thus not fulfilled, and the jury's verdict as to her, therefore, finding her guilty of unlawful sale of an obscene film, in the Court's opinion, had to have been based on surmise or conjecture and her motion for directed verdict should have been granted. The *scienter* required to sustain a conviction for the unlawful sale of obscene motion pictures is more than a mere belief which warrants further inspection or inquiry. The trial Court's instructions which read:

> "As used herein, 'knowingly' means having a general knowledge of, or reason to know, or a belief which warrants further inspection or inquiry of the character and content of a film which is reasonably susceptible of examination by the defendant." 528 S.W. 2d at 381.

were clearly erroneous as to the portion reading: "or a belief . . ." For these reasons, the Supreme Court of Arkansas reversed the judgment as to both appellants and remanded for a new trial.

Not only are jury instructions of "constructive knowledge" unconstitutional and in violation of Petitioner's First, Fourth, and Fourteenth Amendment rights under the United States Constitution, they are also contrary to the rulings of the majority of states in the United States who recognize that the constitutional minimum standard of *scienter* requires actual knowledge, and not mere constructive knowledge, whether it be proved by direct or circumstantial evidence. These decisions may be categorized into a three level approach, namely (a) actual knowledge of the content, character and nature of the material; (b) specific or reasonable awareness of the content, character, and nature of the material; (c) knowledge of the character, nature and content of the material.

The first level approach as to "actual" awareness may be found in *Ginzburg v. United States,* 383 U.S. 463 (1966). In this case, the appellant was convicted pursuant to *Title 18 U.S.C.* §1461 for knowingly sending obscene matter through the mails. The evidence clearly established that the appellant's materials were created, solicited, advertised, and pandered on their appeal to prurient interest: The appellant publisher was found to have deliberately emphasized the sexually provocative aspects of the material through his advertisements and circulars.

Justice Brennan, speaking for the majority, assumed the material in the abstract could not have been ruled obscene, but he found a violation of the statute when the publications were viewed "against a background of commercial exploitation of erotica solely for the sake of prurient appeal," *supra* at 466. As evidence of this background, he pointed to the fact that the appellant had sought mailing privileges from post offices in Blue Ball and Intercourse, Pennsylvania. Thus, *scienter* was established by the appellant's purposeful and deliberate emphasis in advertising material that would appeal to prurient interest; therefore, it was in effect a proclamation on his part that the material was obscene.

It is significant to note that the appellant's marketing technique by virtue of the fact that it was in and of itself "pandering" was significant in the Court's determination that the appellant had actual knowledge of the explicit nature of the material.

In *Womack v. United States*, 294 F.2d 204 (D.C. Cir. 1960), *certiorari* denied, 365 U.S. 859 (1961), the defendant was convicted of knowingly mailing obscene material. The material consisted of unretouched photographs which the appellant admitted he purposefully designed to appeal to homosexual interests. The Court held the photographs to be hard-core pornography and stated that "there could no no possible avoidance of *scienter*." Thus, the element of *scienter* was predicated upon the appellant's admitted awareness of the character of the material and his personal involvement in the actual photographing, assembling, and mailing of the material. Thus, "knowingly" as interpreted by the Court here was based on the appellant's actual awareness of the nature of the material he deposited in the mails.

In *United States v. Ewing*, 445 F.2d 945 (10th Cir. 1971), vacated and remanded on other grounds, 413 U.S. 913 (1971), the defendant was convicted of knowingly mailing obscene material. In this case, the defendant's knowledge of the explicit nature of the material was based on the testimony of his secretaries, business partners, and photographic models who testified that the defendant personally participated in the production of the material which was specifically designed to appeal to a sado-masochistic interest. The Court held that the "calculated purveyance of filth" found in *Mishkin v. New York*, 383 U.S. 502 (1966) was unquestionably present. Thus, *scienter* was established on the basis of the defendant's personal involvement in the production of the publications and his purposeful intent to create material which was specifically designed to appeal to a sado-masochistic type. It is apparent, therefore, that the *scienter* requirement was fulfilled by the defendant's *actual* knowledge of the material.

The issue of actual awareness was again addressed in *Hanf v. State*, 560 P.2d 207 (Okla. Ct. Crim. App. 1977). Refuting defendant's contention that the state failed to introduce sufficient evidence in *scienter* to justify the giving of circumstantial evidence instructions to the jury, the Court of Criminal Appeals of Oklahoma stated:

> "*Scienter*, a specific awareness of contents, which makes the publication obscene, is a necessary element of an obscenity statute . . . *Scienter* does not mean that a defendant must have been aware at the time he sold the publication that the material it contained was obscene. It requires only that he was aware of the *actual* contents of the publication." 560 P.2d 210 (Emphasis added).

The Court thus recognized that it is not a general, but a specific awareness on the part of the defendant, which must be proved to establish *scienter*. The proof required is not that the defendant was specifically aware of the legal obscenity of the publications sold, rather the proof required is that the defendant was specifically aware of the actual contents of the material at the time of sale.

Actual knowledge could not be proved in *Commonwealth v. Thureson*, 357 N.E.2d 750 (Mass. 1976). In this case, the appellant had worked in a bookstore for three days. She claimed that she did not know for whom she worked, and upon being questioned, responded to the police officer, that although she had a "pretty good idea" what was in the peep-show machines, she had never viewed the films. From these facts, the Supreme Judicial Court of Massachusetts reasoned that the prosecution failed to produce evidence "from which a jury could conclude beyond a reasonable doubt that the appellant had seen, or should have seen or otherwise had knowledge of, the material's contents." Thus, even though the defendant should have had knowledge of the contents, and even though she had a

general idea of what was in the machines, she did not have actual knowledge, and the Court reversed appellant's conviction.

The second and third level approach by state and federal courts to the type of knowledge sufficient to fulfill the *scienter* requirement involve decisions which show the personal participation, words, acts, and conduct of a defendant, which clearly prove some cognizable knowledge of the contents, nature and character of materials the defendant transported, shipped, created, or disseminated. Thus, in *Kingsley Books, Inc. v. Brown*, 334 U.S. 436 (1957), a New York statute which authorized local authorities to bring an injunction suit against any person selling or intending to sell obscene materials, and to seek an injunction against further sale of the material pending the outcome of the litigation. The statute provided the seller with an opportunity to contest the charge of obscenity, through a prior adversary hearing, before any penalty attached. It is significant to note that the appellant had consented to the issuance of the injunction, and he did not raise the issue of an adversary hearing within the time limit provided by the statute. After the issuance of the injunction, but before the trial judge's determination that the material was obscene, the appellant continued to distribute the material in question. In upholding his conviction for disseminating obscene material, the Court held that this type of prior restraint procedure was constitutionally permissible in that it afforded the appellant adequate safeguards. It is significant to note that *scienter* as an element of the offense of "knowingly disseminating obscene books" was established by the fact that the appellant knew that the books he continued to disseminate were *questionably obscene*. Thus he continued to disseminate them at his peril. It is apparent, therefore, that where there is conclusive proof of the sale of obscene material by one who knows the questionable nature of what he is selling, *scienter* is established.

In *United States v. Hochmon*, 277 F.2d 631 (7th Cir. 1960), the defendant was convicted of knowingly receiving copies of obscene

material transported in interstate commerce. The evidence disclosed that the books he received were personally selected and scrutinized by him before he ordered them. Thus, the Court held that one who was shown to have scrutinized the contents of the material is charged with the knowledge of its nature. Thus, *scienter* was predicated upon the defendant's (actual) awareness of the explicit nature of the materials.

In *Kahm v. United States*, 300 F.2d 78 (5th Cir. 1962), *certiorari* denied, 82 X.Ct. 949 (1962), the defendant was convicted for knowingly using the mails for the delivery of advertisements giving information as to where obscene material might be obtained. The element of *scienter* was predicated upon proof that the defendant had personally selected and published the material for transmittal, and he further admitted that he had knowledge of the contents. Thus, the evidence was sufficient to show that the defendant mailed what he knew to be sexually explicit. It is clear, therefore, that "knowingly" as interpreted by the Court was based on the defendant's admitted awareness of the nature of the material to be mailed.

In *United States v. Brown*, 328 F.Supp. 196 (D.C. Va. 1971), vacated and remanded, 413 U.S. 912, the defendant was convicted pursuant to *18 U.S.C. § 1462* for "knowingly" using a common carrier for transporting copies of obscene books in interstate commerce. The evidence which established that Brown had knowledge of the explicit nature of the books came from his business associates who testified that the defendant personally selected and scrutinized the books in question. It is significant to note that the defendant in this case personally selected the books from a large stock pool. Thus, *scienter* was established upon the grounds that the defendant personally having perused the books in his selection process, was, therefore, aware of their explicit nature.

In *Spillman v. United States*, 413 F.2d 527 (9th Cir. 1969), *certiorari* denied, 90 S.Ct. 265 (1970), the defendant was convicted

of "knowingly mailing obscene material through the mail in violation of *18 U.S.C. §1461*. In this case, the evidence clearly showed that the defendant was present at every stage of the production of the film, and took a predominate role in the actual photography of the film. Thus, *scienter* was established by the defendant's *conduct*, which conclusively proved that he was aware of the film's content in that he actively participated in its creation.

The thread of commonality that runs through all of these decisions is that they required an *actual* (awareness) knowledge of the contents, nature and character of the materials, and not merely constructive knowledge. To the same effect, see *United States v. Goldstein*, 431 F.Supp. 974 (D.C., D. Kan. 1976); *People v. Williamson*, 24 Cal. Rptr. 734 (1962); *certiorari* denied 377 U.S. 944 (1963); *People v. Andrews*, 100 Cal. Rptr. 276 (1972); *State v. White*, 538 P.2d 1235 (Wash. Ct. App. 1975); *People v. Speer*, 52 Ill. App. 3d 203, 367 N.E. 2d 372 (1977); *State v. Blair*, 32 Ohio St. 2d 237, 291 N.E. 2d 451 (1972); *Johnson v. State*, 351 So.2d 10 Fla. 1977); *State v. Yabe*, 114 Ariz. 89, 559 P.2d 209 (Ariz. Ct. App. 1977); *Wheeler v. State*, 35 Md. App. 372, 370 A.2d 602 (1977); *State v. Richardson*, 506 S.W.2d 488 (Mo. Ct. App. 1974); *State v. Grant*, 508 S.W.2d 14 (Mo. Ct. App. 1974); *Volkland v. State*, 510 S.W.2d 585 (Tex. Ct. Crim. App. 1974); *State v. Mollins*, 533 S.W.2d 231 (Mo. Ct. App. 1975); *State v. Flynn*, 519 S.W.2d 10 (Mo. 1975); *State v. Hull*, 546 p.2d 912 (Wash. 1976).

Petitoner does not contend that he can escape criminal liability by refusing to review the material he distributes. If such were the case, some might refuse to review the material precisely because they "know" what they will find. In a very real sense, such individuals might be held to actually know the content of the material despite the lack of a personal perusal.

What Petitioner does contend, is that he cannot be convicted in the absence of proof of what he actually knew, whether this actual knowledge is proved by circumstantial evidence or otherwise. Georgia's *scienter* standard encompassing constructive knowledge goes beyond this by imposing a duty to make inquiry whenever a jury decides that a reasonable and prudent person would have done so. The requirement of such an inquiry, at the risk of criminal liability, would seriously inhibit the distribution of non-obscene material which has some allusion, however vague or insubstantial, to sex or nudity in its title or cover. This is precisely the impermissible chilling effect condemned in *Smith v. California*, 361 U.S. 147 (1959), and the constructive knowledge standard must thus be found constitutionally infirm.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Georgia Court of Appeals.

Respectfully submitted,

CHARLES W. BOYLE, Esq.
1409 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 892-8890

Attorney for Petitioner

APPENDIX A

(Filed September 5, 1980)

59968 STANCIL et al. v. THE STATE 29-106

DEEN, Chief Judge.

Appeal is brought following convictions on five counts of violating Code Ann. §26-2101.

1. Code Ann. §26-2101 is not unconstitutional. *Sewell v. State*, 238 Ga. 495 (233 SE2d 187) (1977).

2. The trial court did not err in refusing to merge counts one and two of the charges against Stancil. He was accused of selling, or being accessory to the sale of, the same magazine at two different locations on the same date. Proof of sale of two obscene magazines at different times on the same date to the same buyer is two separate offenses. *Wood v. State*, 144 Ga. App. 236 (240 SE2d 743) (1977).

3. The trial judge did not err in refusing to qualify Dr. June Butts as an expert on the issue of whether the alleged obscene magazines have serious scientific value. Appellant argues that the term "science" has not been limited by the Supreme Court to natural or physical sciences but also would embrace social sciences which include the expertise of a sex therapy educator who possesses detailed knowledge of the psychological and physiological impact that the materials might have on an average person. Appellants quote the 1959 case of *Smith v. California*, 361 U.S. 147, 164-165 (80 SC 215, 4 LE2d 205) which holds: "The two reasons coalesce, for community standards or the psychological or physiological consequences of

questioned literature can as a matter of fact hardly be established except through experts." The 1973 case of *Paris Adult Theatre v. Slaton*, 413 U.S. 49 (93 SC 2628, 37 LE2d 446, 449) (1973) held: "It is not error to fail to require expert affirmative evidence that the materials were obscene, when the materials themselves were actually placed in evidence: the films are the best evidence of what they represent." *Pierce v. State*, 145 Ga. App. 680 (244 SE2d 589) (1978); *Woods v. Andersen*, 145 Ga. App. 492, 496 (243 SE2d 748) (1978. Expert opinion evidence is required in certain cases such as medical malpractice where expert opinion evidence is necessary to show community standards, but the courts do not necessarily require expert testimony in obscenity cases.

Whether a witness is qualified as an expert is within the sound discretion of the trial judge. *Glover v. State*, 129 Ga. 717, 718 (9) (59 SE 816) (1907). The issue on appeal is not whether the trial judge was correct but whether he abused his discretion. Appellants' expert described herself as an educator and a social scientist. She defined science as follows: "Science is a methodology that is very strict and very much documented and deals with the art of healing." She further testified: "Scientific method is based on ancient Greek Pedagogy, our understanding of the universe, the understanding of man to the universe, the whole life cycle, it is still debatable, like when is a person dead . . . The scientific method is a thesis, you have a good idea, a good guess, search, could be deductive or inductive, and synthesis. Maybe the opposite view might hold, you are coming from an opposite field and hopefully synthesis." She stated that this definition was taken from Plato. This appears to be the circular reasoning of thesis and its antithesis which yields a synthesis, and then beginning again with the synthesis becoming the thesis and on ad infinitum. This is the dialectic method of the philosopher G.W.F. Hegel dealing with speculatory reasoning and philosophy rather than science. George Gaylord Simpson in *Science*, Vol. 143, p. 769 (1964) has stated: "It is inherent in any definition of science that

statements that cannot be checked by observation are not really about anything . . . or at the very least, they are not science." Hegalism results in relativity of ethics, truth and values and is not science.

It would be the better rule, if in doubt, for the courts to admit experts on each side of cases involving scientific, technical and even philosophical questions, so that jurors could make a better informed decision based on all the expert opinion evidence on both sides of the case although they may reject expert testimony and use their own common sense. The expert witness stated she had extensive training in the area of sex therapy, that she had demonstrated professional achievements in this area, that she had taught this subject in academic institutions, including medical schools, and that she is presently teaching sex therapy in the psychiatry and pediatric departments of Howard University Medical College. The trial judge has wide discretion as to determining whether an expert is qualified. While the trial judge might have permitted Dr. Butts to testify, as he did permit another defense expert to testify, considering all circumstances under the facts presented, we cannot say he abused his discretion in this case.

Additionally appellants did not proffer any testimony of this witness on the issue of serious scientific value. "On direct examination, to afford a basis for the assertion of error, it must appear that a pertinent question was asked, that the court ruled out an answer, that a statement was made to the court at the time showing what the answer would be, and that such testimony was material and would have benefited the complaining party." *Williams v. Tribble*, 140 Ga. App. 390 (231 SE2d 86) (1976), quoting from *Barron v. Barron*, 185 Ga. 346, 347 (2) (194 SE 905) (1938). Other cases agree that a proffer is inadequate unless it appears "what answers were expected, and that the trial judge was informed thereof at the time the questions were propounded," *Seaboard Air-Line Railway v. Vaughn*, 19 Ga. App. 397, 398 (2) (91 SE 516) (1916). *Flynt v. State*, 153 Ga. App. 232 (3)

(265 SE2d 30) (1980). As argued in appellee's brief, since the court was not told what the expert would have testified to, there is always the possibility that she would have said, to the surprise of the appellants, that the magazines lack serious scientific value and were obscene.

4. The trial court correctly charged the jury on constructive knowledge. Code Ann. §26-2101 (a).

5. The trial court did not err in charging the jury that "material not otherwise obscene may be obscene under this section if the distribution thereof or the offer to do so or the possession with the intent to do so is commercial exploitation of erotica solely for the sake of their purient appeal." This language is taken from Code Ann. §26-2101 (d).

6. The trial court charged: "In assessing contemporary community standards, you are permitted to draw on your own knowledge of the community. The phrase 'contemporary community standards' means the average conception of the time and the present critical point in the compromise between candor and shame in which the community may have arrived here and now."

Appellant argues that the court erred in refusing to charge on the community standards of tolerance and that the charge as given was erroneous, prejudicial and violative of his due process rights. In *Smith v. United States*, 431 U.S. 291, 394 (97 SC 1756, 52 LE2d 324) (1977), the Supreme Court held that "obscenity is to be judged according to the average person in the community rather than the most prudish or the most tolerant." While the charge as given is not in the exact words and does not reflect with precision the definition of a community standard as given in Smith, it does substantially comply therewith with sufficient clarity. Therefore, we cannot say the charge as given constitutes harmful and reversible error.

7. The trial court did not err in refusing to enter a judgment notwithstanding the verdict. Such a remedy is not available in a criminal case and a defendant's remedy is a motion for a new trial. See *Wilson v. State*, 215 Ga. 775 (113 SE2d 607) (1960). After an examination of the evidence in this case, we find that it is obscene within the definition of Code Ann. §26-2101.

Judgment afirmed. Birdsong and Sognier, JJ., concur.

APPENDIX B

Case No. 36868

SUPREME COURT OF GEORGIA

Atlanta, October 16, 1980

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Application for certiorari to review the Court of Appeals decision in:

JAMES D. STANCIL ET AL.

v.

THE STATE

having been filed in this Court and motion for extension of appeal bond having been filed, it is hereby ordered that said motion be denied.

Pursuant to Code Ann. §27-901 as amended petitioner's appeal bond is terminated.

SUPREME COURT OF THE STATE OF GEORGIA

CLERK's OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Mrs. Joline B. Williams
Clerk

APPENDIX C

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta, November 5, 1980

Dear Sir:

Case No. 36868. Stancil et al v. The State

The motion for a reconsideration was denied today:

Very truly yours,

Mrs. Joline B. Williams
Clerk

APPENDIX D

Constitutional and Statutory Provisions

1. The pertinent provisions of the First Amendment are:

   "Congress shall make no law . . . abridging the freedom of speech, or the press. . . ."

2. The pertinent provisions of the Fourteenth Amendment are:

   "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction in the equal protection of the laws."

CERTIFICATE OF SERVICE

I certify that I have served three (3) copies of the Petition for Writ of Certiorari to the Georgia Court of Appeals in the above styled case upon HINSON McAULIFFE, Fulton County Solicitor, 53 Civil-Criminal Courts Building, Atlanta, Georgia 30303, and upon ARTHUR K. BOLTON, Georgia Attorney General, 132 State Judicial Building, Atlanta, Georgia 30334, by depositing same in the U. S. Mail in properly addressed envelopes with sufficient postage affixed thereto to insure delivery this 5th day of January, 1981.

/s/ Charles W. Boyle
1409 Peachtree St., N.E.
Atlanta, Georgia 30309
(404) 892-8890

Attorney for Petitioner